No.

IN THE

Supreme Court of the United States

JUAN ALMONACID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case thus presents the following important questions:

1. Whether the Seventh Circuit erred in holding that, because there was not overwhelming evidence of guilt, counsel's advice to reject an eight-year plea offer was reasonable, where the precedent of its sister circuits dictates that effective assistance of counsel in the plea bargaining context requires that counsel give a criminal defendant the information necessary to make an informed decision to accept or reject a plea offer — particularly in light of the petitioner's complaint that counsel never informed him of the benefits of accepting the plea offer, including the sentencing exposure at trial, and he rejected said plea offer based on counsel's advice and is currently serving a 235-month sentence.

2. Whether the petitioner was entitled to an evidentiary hearing under 28 U.S.C. § 2255 where he alleges that counsel never informed him of the benefits of accepting the plea offer, including the sentencing risks at trial, and that he would have accepted the plea offer had he been fully advised.

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Petitioner Juan Almonacid respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Almonacid v. United States*, 476 F.3d 518 (7th Cir. 2007) (App. at 1a – 8a). The opinion of the district court denying post–conviction relief (App. at 9a – 17a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

28 U.S.C. § 2255 provides, in relevant part, that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." *Id.*

STATEMENT OF THE CASE

A Pre–trial and Trial Proceedings

In 1998, Almonacid was indicted under 21 U.S.C. §§ 846 and 841(a)(1) for conspiring to possess with intent to distribute fifty kilograms of cocaine. *United States v. Almonacid*, 70 Fed. Appx. 390, 390 (7th Cir. 2003). Before

trial, the government offered Almonacid a plea deal wherein if he pled guilty to two counts of using a telephone to facilitate a drug-trafficking offense, he would receive a sentence guaranteed not to exceed eight years under the U.S. Sentencing Guidelines (the "Guidelines").[1] (R.1-1 at 40 n.5.) If Almonacid rejected the plea offer and went to trial, he faced a sentence of twenty-four and one-half years. Based on the advice of counsel, Almonacid rejected the plea offer.

On July 18, 2001, the jury returned a guilty verdict against Almonacid for possession with intent to distribute cocaine. *Almonacid*, 70 Fed. Appx. at 390. On April 8, 2002, the district court imposed a sentence of nineteen and one-half years.

Almonacid timely filed in the Seventh Circuit Court of Appeals a notice of appeal challenging his conviction and sentence. *Almonacid*, 70 Fed. Appx. at 390–91. On July 17, 2003, the Seventh Circuit affirmed the judgment of the district court, finding that the government presented sufficient evidence to support both the jury verdict and the sentence imposed. *Almonacid*, 70 Fed. Appx. at 391–93.

B. Post–conviction Proceedings

On July 7, 2004, after exhausting his direct appeal remedies, Almonacid timely filed a *pro se* motion under 28 U.S.C. § 2255, over which the district court had jurisdiction pursuant to 28 U.S.C. § 1331. *See* 28 U.S.C. § 1331 (subject matter jurisdiction). Almonacid complains that his Sixth Amendment right to effective assistance of counsel was violated because his attorney never informed him of the benefits of the government's plea offer, including his sentencing exposure at trial or the risk of conviction based on the testimony of his co–defendants (leading him to believe that he could not be convicted without evidence of confiscated drugs). (*See* R.1-1 at 14; R.3 at 1; R.1-1 at 16.) Almonacid further alleges that counsel told him to reject the

[1] The government stipulated to the existence of the plea offer and its terms.

plea offer because the government "had nothing on [him]." (R.3 at 1.) Never having been informed of the consequences of standing trial, Almonacid alleges that he relied on counsel's opinion and rejected the plea offer. (R.3 at 1.) He requests that the eight-year plea offer be reinstated.

In responding to Almonacid's Motion, the government did not submit an affidavit from counsel or any other evidence to show that Almonacid's allegations were incredible. In fact, the government simply ignored Almonacid's allegations concerning the specific deficiencies of counsel's performance. Rather than address Almonacid's complaints about the content and quality of information he received from counsel, the government argued that counsel's recommendation to reject the plea offer was reasonable because the evidence against him was not "overwhelming" and "there were a variety of viable defenses at trial." (R.1-1 at 46–47.) The government's argument rested on the Seventh Circuit's decision in *Gallo-Vasquez v. United States*, 402 F.3d 793 (7th Cir. 2005), which held that counsel's advice to reject a plea offer does not constitute deficient performance unless there was overwhelming evidence of guilt and an absence of viable defenses. *Id.* Here, the government's argument rested solely on the evidence contained in trial and sentencing transcripts.

Like the government's response, the district court's decision never addressed Almonacid's allegations regarding counsel's failure to inform him of the benefits of accepting the plea offer, including his sentencing exposure at trial. Instead, citing his observations at trial and during the sentencing hearing, the district judge found that there was not overwhelming evidence of Almonacid's guilt and that he had asserted a variety of defenses. Applying *Gallo-Vasquez,* the district court held that counsel's recommendation to reject the plea offer was reasonable. The district court noted that "[c]onsiderable deference is owed to tactical judgment of counsel in these cases" and further held that counsel's opinion was "based on an assessment of the weight of the evidence . . . [and] [i]t is quite impossible on this record and the events of trial to conclude that defense counsel's conduct

[sic] fall outside the ambit of professional competence." (A. 9a – A. 17a.)

On November 21, 2005, Almonacid timely filed a Petition for a Certificate of Appealability. On December 20, 2005, the district court declined to grant the certificate. The Seventh Circuit Court of Appeals granted Almonacid's request for a certificate of appealability on March 6, 2006. The circuit court certified the following issue: whether counsel's advice to reject the government's plea offer constituted deficient performance in violation of Almonacid's Sixth Amendment rights.

On March 29, 2006, the Seventh Circuit appointed present counsel to represent Almonacid in his post–conviction appeal pursuant to the relevant provisions of the Criminal Justice Act.

On appeal, Almonacid argued that counsel's omissions regarding the benefits of accepting the plea offer, including the sentencing risk at trial and the possibility of a conviction based on co-defendant's testimony, deprived him of the right to make an informed decision regarding the plea offer. The government continued to ignore Almonacid's specific allegations regarding counsel's omissions [2] and again invoked *Gallo-Vasquez* claiming that counsel's recommendation to reject the plea offer was reasonable because there was not overwhelming evidence of

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[2] In its response brief, the government asserted — *without citing to the record* — that Almonacid was aware of the sentence he faced if he rejected the plea offer because he was told by the district judge at his initial appearance. However, at oral argument, the government conceded that this allegation was baseless, after Almonacid's counsel informed the court (in response to questioning on this issue) that a review of the tape from Almonacid's initial appearance revealed that, in fact, Almonacid was *not* informed of his sentencing exposure at his initial appearance. (Transcript of Oral Argument held on December 8, 2006, at 8, hereinafter "Tr.".)

Almonacid's guilt and his defenses "abounded." The government also claimed that counsel satisfied his obligations to his client by (i) informing Almonacid of the eight-year plea offer, (ii) making *a* recommendation on what plea to enter, and (iii) allowing Almonacid to make that decision.

On February 14, 2007, the Seventh Circuit issued its decision upholding the ruling of the district court. The Seventh Circuit explained that "[w]hen counsel advises the defendant to reject a plea offer, his performance is not objectively unreasonable unless such advice is made 'in the face of overwhelming evidence of guilt and an absence of viable defenses.'" *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007) (quoting *Gallo-Vasquez*, 402 F.3d at 798). Applying this standard, the Seventh Circuit held that counsel did not render deficient performance in advising Almonacid to reject the plea offer because there was not "overwhelming evidence" of his guilt, and he had "viable" defenses. *Almonacid*, 476 F.3d at 522. Like the decision of the district court, the Seventh Circuit's decision did not address Almonacid's allegations regarding counsel's failure to inform Almonacid of the benefits of the government's plea offer, including the sentencing risk of standing trial. Accordingly, no court has considered the impact of counsel's omissions on Almonacid's decision.

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory jurisdiction is warranted because the Seventh Circuit's decision conflicts with standing case law of the Sixth Circuit. The Sixth Circuit holds that counsel's failure to advise his client to accept a plea offer in the face of overwhelming evidence of guilt is not deficient performance. Moreover, the Seventh Circuit's decision departs from the authority of other circuits, including the Third Circuit, Fifth Circuit, and the Ninth Circuit. These other circuits hold that a criminal defendant has the right to make an informed decision on whether to accept or reject a plea offer. Finally, the Seventh Circuit's decision fails to consider counsel's obligations under

prevailing professional norms, as directed by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 688–90.

I. THE SEVENTH CIRCUIT DECISION THAT COUNSEL'S PERFORMANCE WAS REASONABLE BECAUSE HE DID NOT ADVISE PETITIONER TO REJECT THE EIGHT-YEAR PLEA OFFER IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT AND THE ABSENCE OF DEFENSES SHOULD BE REVERSED

A. The Seventh Circuit's Holding Conflicts with the Sixth Circuit's Decision in *United States v. Smith*

The Sixth Circuit holds that a criminal defendant has the right to make an informed decision on whether to accept or reject a plea offer. *Smith v. United States*, 348 F.3d 545 (6th Cir. 2003). In reaching this conclusion, the Sixth Circuit further holds that counsel's advice to reject a plea offer in the face of "overwhelming evidence of guilt" cannot constitute deficient performance because the proper consideration in this context is whether counsel provided his client with the information the client needed to make an informed decision. *Id.* at 552–54. The legal standard adopted by the Seventh Circuit in *Gallo-Vasquez* and applied in this case squarely conflicts with the Sixth Circuit's holding in *Smith*, and rests on the erroneous premise that counsel's advice to reject a plea offer is solely a matter of strategy.

In *Smith* the petitioner filed a motion pursuant to 28 U.S.C. § 2255 alleging that his Sixth Amendment right to effective assistance of counsel was violated during plea bargaining. Specifically, the petitioner alleged that his attorney's performance was constitutionally deficient because counsel did not insist that he accept a 20-month plea offer even though there was "overwhelming evidence of guilt." *See id.* at 548–49, 552. The petitioner was convicted at trial and

sentenced to 262 months imprisonment. *See id.* The government argued that the petitioner could not establish deficient performance by counsel because, by his own admission, he was aware that the government had made a 20-month plea offer. *Id.* at 549. Further, the government submitted an affidavit from counsel swearing that the petitioner was aware of the government's plea offer and that he "discussed" the offer with his client. *Id.* at 549–50. The district court rejected the petitioner's claim; the court found that the petitioner failed to establish prejudice and reasoned that, because the petitioner was aware of the plea offer and went to trial protesting his innocence, "it was unlikely that [the petitioner] would have pleaded guilty even if he had received proper advice from his attorney." *Id.* at 550.

On appeal, the Sixth Circuit explained that, because the "decision to plead guilty — first, last, and always — rests with the defendant, not his lawyer," the issue, as presented by petitioner, was an improper "basis upon which to find deficient performance by defense counsel." *Id.* at 552. The court acknowledged that counsel "*may* provide an opinion on the strength of the government's case . . . and the wisdom of a chosen course of action" when counseling her client regarding a plea offer made by the government, but explained that the relevant consideration in this context for purposes of evaluating counsel's performance is whether counsel "*fully* inform[ed] her client of the available options." *Id.* (emphasis added). The court further defined counsel's obligations to his client:

> [I]n the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines . . . [a] criminal defendant has the right to expect *at least* that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the *sentencing exposure* the defendant will face as a consequence of exercising each of the options available.

Id. at 552–53 (emphasis added). The Sixth Circuit further held that "[t]he criminal defendant has a right to this information, just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law." *Id.* at 553.

Based on the evidence submitted in *Smith*, the Sixth Circuit concluded that "the record in this case leaves . . . considerable doubt over the nature and quality of the advice [the defendant] received before he made his final decision to reject the government's proposed plea bargain." *Id.* Specifically, the court noted that counsel's affidavit never stated that he had informed his client "of the dramatically higher sentence potential (over ten times as much incarceration) to which Smith was exposed if he were convicted of even one of [the] many charges." *Id.* Significantly, the court declined the government's invitation to find that the petitioner made an informed decision to reject the plea offer because the petitioner was aware that he faced a "'steep sentence'" at trial, finding that there was "no other evidence that [the defendant's] sentencing exposure . . . was ever conveyed to [the defendant] *before* trial." *Id.* (emphasis added). Because there was nothing in the record that allowed the court to determine conclusively that the petitioner knew his sentencing exposure before he made the decision to reject the plea offer, the Sixth Circuit remanded the case for an evidentiary hearing. *Id.* at 553–54.

The Sixth Circuit's decision in *Smith* emphasizes the clear distinction between counsel's obligation to inform a defendant of the considerations that are material to making an informed decision on whether to accept or reject a plea offer and counsel's opinion as to whether — as a matter of strategy — he thinks his client should accept the plea offer or go to trial. The foundation for this distinction stems from this Court's Sixth Amendment jurisprudence. Indeed, this Court has recognized that the decision whether to plead guilty or contest a criminal charge — ordinarily the single most important decision in any criminal case — must be made by the defendant, not counsel. *See, e.g., Roe v. Flores-*

Ortega, 528 U.S. 470, 484–87 (2000) (implying that the decision of whether to plead accept or reject a plea rests with the defendant); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). And, that a defendant has a right to effective assistance of counsel in making that decision. *See McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970); *Hill*, 474 U.S. at 57 (quoting *McMann*, 397 U.S. at 771 & n.14) ("Our concern . . . with the quality of counsel's performance in advising a defendant whether to plead guilty stem[s] from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.'"). Finally, in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Circuit evaluates the reasonableness of counsel's performance by the standards of prevailing professional norms. *See Strickland*, 466 U.S. at 690; *Smith*, 348 F.3d at 552–54.

B. The Defendant's Right to Make an Informed Decision Regarding Whether to Reject a Plea Offer Based on the Advice of Counsel Is Widely Recognized

The Sixth Circuit's holding that a defendant has a right to an informed decision on whether to accept or reject a plea offer is widely supported by our nation's federal jurisprudence. In *United States v. Day*, 969 F.2d 39 (3d Cir. 1992), the Third Circuit held that "a defendant has the right to make a reasonably informed decision whether to accept a plea offer." *Id.* at 43 (citing *Hill*, 474 U.S. at 56–57 (finding that voluntariness of guilty plea depends on adequacy of counsel's advice)); *Id.* at 40 (finding that petitioner stated a claim for ineffective assistance of counsel where he alleged that he rejected plea bargain of five years on advice of

counsel, and was sentenced to 22 years after trial). Further, the court held that "[k]nowledge of the *comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty*." *Id.* at 43 (emphasis added). The Third Circuit recently emphasized the importance of the defendant's right to make an informed decision on whether to accept or reject a plea offer in *United States v. Booth*, 432 F.3d 542, 549–50 (3d Cir. 2005). In *Booth* the court held that if a defendant raised sufficient allegations suggesting that his counsel's advice in helping to make the decision was "'so insufficient that it undermined [the defendant's] ability to make an intelligent decision about whether to accept the [plea] offer,'" the defendant was entitled to an evidentiary hearing on the merits of his habeas petition. *Id.* (citing *Day*, 969 F.2d at 43–44).

Similarly, the Fifth Circuit unequivocally found that a failure to advise a defendant of the maximum sentence imposable at trial violated *Strickland's* objective standard of reasonableness. *See United States v. Grammas*, 376 F.3d 433, 436–37 (5th Cir. 2004); *see also Teague v. Scott*, 60 F.3d 1167, 1171–72 (5th Cir. 1995) (habeas petition for ineffective assistance remanded for hearing on prejudice where counsel misrepresented sentencing exposure). In *United States v. Herrera*, the court noted that one of the most important duties for an attorney representing a criminal defendant is to advise him about accepting a guilty plea. 412 F.3d 577, 581–82 (5th Cir. 2005) (finding misrepresentation of sentencing exposure deficient performance and remanding case for evidentiary hearing regarding defendant's reliance on his trial attorney's statements). An attorney discharges this obligation, the court noted, "by informing the defendant about the relevant circumstances and the likely consequences of a plea," of which his sentencing exposure is a necessary part. *Id.* Without this full understanding, the "defendant cannot make an intelligent choice." *Id.*

This right to make an informed decision also is recognized by the Ninth Circuit. *See Nunes v. Mueller*, 350 F.3d 1045, 1052–53 (9th Cir. 2003); *see also Martin v. Thomas*, 130 Fed. Appx. 121, 123 (9th Cir. 2005) (unpublished opinion) ("Martin had the right to make an informed decision on whether to plead guilty or go to trial."). In *Nunes*, the defendant filed a motion pursuant to 28 U.S.C. § 2254 alleging that his Sixth Amendment right to effective assistance of counsel was violated because his counsel misrepresented his sentencing exposure in advising him of a plea offer. *See Nunes*, 350 F.3d at 1049–50. There, the prosecution argued that Nunes suffered no prejudice because he received a fair trial. *See id.* at 1052. The Ninth Circuit disagreed with the prosecution and explained "the right that Nunes [argued] he lost was not the right to a plea bargain as such, but rather the right to counsel's assistance in making an informed decision once a plea had been put on the table." *Id.* The court reasoned:

> During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel's "duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" (*Strickland*, 466 U.S. at 688). Those obligations ensure that the ultimate authority remains with the defendant "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." (*Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). Here the right that Nunes claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.

Nunes, 350 F.3d at 1053.

The Second and Fourth Circuits hold that prevailing professional norms dictate that counsel is obligated to provide his client with the information he needs to make an informed decision, and failure so inform one's client constitutes deficient performance under *Strickland*. In *Purdy v. United States*, 208 F.3d 41 (2d Cir. 2000), the Second Circuit found that the Model Rules of Professional Conduct required counsel to communicate to the defendant the terms of the plea agreement offered by the government, and counsel "should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy*, 208 F.3d at 44–45; *see also United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) ("'[K]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.'") (citation omitted). Similarly, in *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), the Fourth Circuit turned to the ABA Standards for Criminal Justice in its analysis of a claim for ineffective assistance of counsel in the context of considering a plea agreement. *See Jones*, 947 F.2d at 1110–11. Quoting Standard 14–3.2, the court held that "'[t]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the client of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.'" *Jones*, 947 F.2d at 1110 (citation omitted). These alternatives necessarily included the defendant's sentencing exposure at trial. *Id.* at 1110–11.

In this vein, the Second Circuit recently emphasized that counsel has an obligation to "adequately inform her client about the considerations that are relevant to her client's decision to accept or deny a plea bargain." *Davis v. Greiner*, 428 F.3d 81, 88 (2d Cir. 2005). The Second Circuit reasoned that failing to inform a defendant of a crucial aspect of the plea offer is a breach of counsel's duty to "'explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding representation.'" *Id.* at 89 (quoting Model Rules of Prof'l Conduct R. 1.4(b)).

The Sixth Circuit's holding that a defendant has a right to an informed decision on whether to accept or reject a plea offer also is widely supported by the jurisprudence of our States. *See, e.g., Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978) (counsel ineffective in giving no advice about desirability of plea offer with three-year maximum sentence when trial risked ten to forty years); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988) (citing ABA standard finding that "[o]bjective professional standards dictate that a defendant . . . be *advised of the consequences of the choices confronting him*" when deciding whether to accept or reject a plea offer and "[f]or counsel to do otherwise amounts to less than reasonably professional assistance" (emphasis added)); *People v. Whitfield*, 239 N.E.2d 850, 852 (Ill. 1968) (finding the decision whether to accept or reject a plea offer goes "beyond trial strategy" and therefore such decision rests with the defendant not his counsel or mother); *Lyles v. State*, 382 N.E.2d 991, 993–94 (Ind. Ct. App. 1978) ("'Because plea discussions are usually held without the accused being present, there is a duty on the lawyer to communicate *fully* to his client the substance of the discussions. . . . If the accused's choice on the question of a guilty plea is to be an informed one, he must act with *full awareness* . . . .'" (quoting commentary to ABA Standards, The Defense Functions § 6.2(a)) (emphasis added)); *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983) (same); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. App. 1984) (same); *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex. Crim. App. 1987) (same); *Commonwealth v. Copeland*, 554 A.2d 54, 60 (Pa. Super. Ct. 1988) (stating "[d]efense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial"); *State v. Ludwig*, 369 N.W.2d 722, 727 (Wis. 1985) (stating "simple disclosure of the terms of [plea] offer to the Defendant is of little value"); *Leath v. State*, No. E2004–02708-CCA-R3-PC, 2005 WL 3543343, at *8–9 (Tenn. Crim. App. Dec. 28, 2005) (explaining a trial counsel's failure to inform a petitioner of the potential maximum sentencing exposure in the plea offer context is grounds for ineffective assistance); *People v. Curry*, 687 N.E.2d 877, 887 (Ill. 1997) (stating that a

"criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer" including sentencing information (emphasis omitted)); *State v. James*, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (finding that, to effectively assist client, counsel must aid client in making an informed decision to accept or reject plea offer by discussing with client the strengths and weaknesses of client's case); *Tucker v. Holland*, 327 S.E.2d 388, 394 (W. Va. 1985) (stating counsel's advice must be accurate to enable client to make an informed choice whether to accept plea); *People v. Brown*, 723 N.E.2d 362, 366 (Ill. App. Ct. 1999) (finding "counsel did not fulfill his duty to accurately inform defendant of the direct consequences likely to stem from acceptance or rejection of the [plea]"); *State v. Donald*, 10 P.3d 1193, 1201 (Ariz. 2000) (concluding that failure to explain sentencing aspects of plea offer was deficient advice); *Cottle v. State*, 733 So. 2d 963, 969 (Fla. 1999) (stating "an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea"); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992) (explaining that a trial attorney "who . . . provides the defendant with incomplete or misleading information with regard to the [plea] offer" performs deficiently).

C. Under Prevailing Professional Norms, Counsel Is Obligated to Ensure that the Defendant's Decision Is Informed

Although this Court has declined to "exhaustively define the obligations of counsel," it has stated that the relevant inquiry must be whether counsel's assistance was reasonable under prevailing professional norms and considering the surrounding circumstances. *Strickland*, 466 U.S. at 688. Prevailing professional norms make clear that counsel has a duty to ensure that his client's decision on whether to accept a plea offer or go to trial is informed. The American Bar Association Standards for Criminal Justice state that "[t]he decisions which are to be made by the accused after *full* consultation with counsel include: . . . whether to accept a plea agreement . . . ." American Bar Ass'n, *ABA Standards*

for Criminal Justice: Prosecution and Defense Function, Standard 4-5.2(a), at 199–200 (3d ed. 1993) [hereinafter, "*ABA Standards for Criminal Justice*"] (emphasis added). This principle is paralleled in the Model Code of Professional Responsibility (the "Model Code"), which provides that "[a] defense lawyer in a criminal case has the duty to advise his client *fully* on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be entered . . . ." *See* Model Code of Prof'l Responsibility EC 7–7 (1980) (emphasis added). For the avoidance of any doubt, the Model Code expressly states that counsel has a duty to "explain a matter to the extent reasonably necessary to permit a *client to make informed decisions* regarding representation." Model Rules of Prof'l Conduct R. 1.4(b) (2007) (emphasis added).

Any ambiguities regarding the type of information that a defendant needs to make an informed decision on whether to accept or reject a plea offer also are clarified by prevailing professional norms. These standards indicate that, at a minimum, counsel should inform the defendant of the terms of the plea offer, and the consequences of rejecting it, including the maximum and minimum sentences which may be imposed in the event of a conviction. *See ABA Standards for Criminal Justice*, *supra*, Standard 4–5.1 cmt., at 198 ("The matters on which [a] defendant needs advice before entering a plea go beyond appraisal of the likelihood of conviction or acquittal. Counsel should inform the defendant of the maximum and minimum sentences that can be imposed . . . ."). The importance of the defendant's knowledge of the consequences of the alternatives available to him, *i.e.*, accepting the plea offer or standing trial, cannot be overstated: "If the [defendant's] choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor." *See ABA Standards for Criminal Justice*, Standard 4–6.2(a) cmt.

These professional norms underscore the distinction between the defendant's *decision* to accept or reject a plea offer and counsel's *opinion* as to whether the defendant

should accept or reject the plea offer, and they make clear that the reasonableness of counsel's performance is measured by whether the defendant's *decision* was an informed one. Indeed, nothing in these standards can be read to suggest that, so long as counsel provides an opinion on the matter which later proves to be reasonable, counsel need not satisfy the other duties he owes his client. In other words, counsel's *opinion* on whether his client should go to trial is not a substitute for giving his client the information necessary to make an informed judgment on whether the benefits of the plea offer outweigh the risks of going to trial. *See Smith*, 348 F.3d at 552 ("Although the attorney may provide an opinion on the strength of the government's case . . . the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction."). The reason for this is obvious: While counsel himself might view the chance of acquittal and serving no time outweighs the benefit of a lower certain sentence under the plea offer, his client might view the guaranteed lower sentence under the plea offer as a benefit that outweighs the risk, however slight, of receiving the maximum possible sentence if convicted at trial. Nevertheless, counsel's *opinion* might properly be viewed as strategy or tactical decisions that are not to be judged with the benefit of hindsight; however, there is no strategy or judgment involved in counsel breaching his professional obligations by failing to give his client the information the client needs to assess the matter for himself. *See Davis*, 423 F.3d at 90 (finding that there could be "no appropriate strategic reason for failing to inform his client of the risk of proffering"); *see also Kates v. United States*, 930 F. Supp. 189, 192 (E.D. Pa 1996) (finding ineffective assistance of counsel where counsel failed to inform client of sentencing exposure if client rejected plea offer).

II. ALMONACID COMPLAINS THAT HIS DECISION TO REJECT THE PLEA OFFER WAS UNINFORMED

The crux of Almonacid's complaint is that counsel failed to give him the information necessary to make an informed decision on whether to accept the eight-year plea offer or go to trial. Indeed, the allegations in Almonacid's motion and accompanying documents are directed at the complete lack of information from counsel concerning the benefits of pleading guilty and risks of going to trial. It is these omissions — rather than affirmative misrepresentations by counsel — that deprived Almonacid of his right to make an informed decision. [3] Without this vital bottom-line information, Almonacid's decision was based on counsel's *opinion* that he should reject the plea offer because the government had "nothing on [him]."

Under the established precedent of the Third, Fifth, Sixth and Ninth circuits, Almonacid's allegations, if proven, establish a clear violation of his right to make an informed decision on whether to accept or reject the government's eight-year plea offer. Counsel's performance — informing

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[3] That counsel omitted Almonacid's sentencing exposure when he recommended that Almonacid stand trial rather than making an explicit misrepresentation when advising him to reject the plea offer is a distinction without a difference. In addition to the clear obligation to disclose this information, *supra*, it is well understood that an *omission* of material information is tantamount to a misrepresentation. *See United States v. Bouthot*, 878 F.2d 1506, 1511 (1st Cir. 1989); *cf. United States v. Blaylock*, 20 F.3d 1458, 1465–66 (9th Cir. 1994) ("If an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, *a fortiori,* failure even to inform defendant of the plea offer does so as well."); *Cuthrell v. Director Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (holding that counsel *must* inform a defendant of the direct consequence of a conviction and explaining that a direct consequence is a consequence that represents "a definite, immediate, and largely automatic effect on the range of a defendant's punishment").

Almonacid of the terms of the plea offer and recommending that Almonacid reject it on the conclusory statement that the government "had nothing on [him] — plainly omitted critical information regarding risks of standing trial from Almonacid's consideration. As the Sixth Circuit explained in *Smith*, Almonacid had the right to expect, at least, that counsel would "review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure that [he faced] as a consequence of exercising each of the options available to him." *Smith*, 348 F.3d at 553.

That Almonacid had the right to make an informed decision is founds in prevailing professional norms. As previously discussed, these standards dictate that counsel had an obligation to advise Almonacid *fully* about the benefits of the eight-year plea offer. *See* Model Code of Prof'l Responsibility EC 7–7 (1980) ("A defense lawyer in a criminal case has the duty to advise his client *fully* on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be entered . . . .") (emphasis added). This means that counsel was required to inform Almonacid that the consequences of rejecting the plea offer included a maximum sentence that exceeded twenty-four years, and the possibility that the government could sustain a conviction on co–defendant testimony. *See ABA Standards for Criminal Justice*, *supra*, Standard 4–5.1 cmt., at 198. Counsel's opinion, in the absence of information explaining the potential downside of his recommended course of action, constituted a breach of his professional obligations. Importantly, counsel had no basis for *assuming* that Almonacid otherwise understood the sentencing benefits of accepting the plea offer, particularly since Almonacid speaks little English and had no previous experience with the criminal justice system. Regardless of whether counsel's *opinion* to reject the plea offer, in hindsight, was a reasonable strategy, this strategy does not justify counsel omitting such critical information from his advice before

trial.[4] *See Strickland*, 466 U.S. at 690–91. Counsel's performance was unreasonable "under prevailing professional norms," and his deficient performance caused Almonacid to reject a plea offer that was less than half of the sentence that he is currently serving. *Id.* at 688.

Here, the implicit holding of the Seventh Circuit's decision is that Almonacid did not have a right to make an informed decision on whether to accept or reject the plea offer, and this conflicts with the jurisprudence of the circuit's sister courts and that of many states. Moreover, the standard against which the Seventh Circuit evaluates the performance of counsel in this context, as reflected in *Gallo-Vasquez*, falls well below the objective standards of reasonableness established prevailing professional norms, and adopted by its sister circuits. In focusing on whether counsel's recommendation to reject the plea offer was reasonable in light of the evidence presented at trial, the Seventh Circuit implicitly endorsed counsel's breach of his duties to "explain a matter to the extent reasonably necessary to permit [Almonacid] to make informed decisions regarding the representation," Model Rules of Prof'l Conduct R. 1.4(b) (2007), and "advise [Almonacid] fully on whether [the eight-

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[4] That Almonacid rejected the plea offer, rather than entering a guilty plea, does not change the standard by which counsel's performance is to be judged. Indeed, counsel's obligation in this context is to assist his client in the decision-making process:

> Both alternate decisions — to plead guilty or instead to proceed to trial — are products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

In re Alvernaz, 830 P.2d 747, 753–54 (Cal. 1992).

year plea offer was] desirable." Model Code of Prof'l Responsibility EC 7-7 (1980).

Notwithstanding that Almonacid's allegations concerned a specific instance of misconduct that occurred *outside* the record, the Seventh Circuit assumed the role of Monday morning quarterback in finding that counsel's recommendation to reject the plea was reasonable because there was not "overwhelming" evidence of Almonacid's guilt at trial. Because the Seventh Circuit's decision conflicts with the Sixth Circuit's decision in *Smith*, and the standard for deficient performance established therein sanctions conduct by both counsel and the courts departing from this Court's jurisprudence, this Court should grant certiorari to resolve these conflicts.

III. BECAUSE THE RECORD DOES NOT CONCLUSIVELY SHOW THAT ALMONACID IS ENTITLED TO NO RELIEF, THE SEVENTH CIRCUIT WAS REQUIRED TO REMAND THE CASE FOR AN EVIDENTIARY HEARING

The Seventh Circuit further held that, based on the "evidence" submitted by Almonacid and on the district court's observations from prior proceedings, "it cannot be said that the court erred" when it summarily dismissed Almonacid's claim. The Seventh Circuit's standard for granting an evidentiary hearing — requiring a petitioner to proffer *evidence* showing that he is entitled to relief — ignores the standard established by Congress in 28 U.S.C. § 2255 and conflicts with the long-standing precedent of this Court.

District Courts are required to "grant a prompt hearing" when [a Section 2255] motion is filed "*unless* the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (emphasis added). This Court holds that district courts must strictly construe 28 U.S.C. § 2255 and has remanded Section 2255 motions for evidentiary hearings where the petitioner's

allegations related to events or circumstances outside the record or the presence of the district judge issues or where the issues raised by the motion could not be conclusively determined either by the motion itself or by the files and records in the trial court. *See, e.g.*, *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (remanding for evidentiary hearing Section 2255 motion alleging guilty plea was not knowing and voluntary because it was induced by the prosecutor's promises regarding the length of the sentence defendant would receive); *Fontaine v. United States*, 411 U.S. 213, 214–15 (1973) (remanding for evidentiary hearing Section 2255 motion alleging that plea was not voluntary because it was induced by a combination of fear, coercive police tactics, and illness); *see also Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (holding that only "conclusory *allegations*" or "*contentions* that in the face of the record are wholly incredible" are subject to summary dismissal) (emphasis added).

Moreover, this Court flatly rejected the notion that the statute requires a movant submit evidentiary support when filing his motion. *See, e.g.*, *Machibroda*, 368 U.S. at 495 (holding that the petitioner's allegations warranted a hearing to afford the petitioner an "opportunity to support [the allegations] by evidence . . ."); *Blackledge*, 431 U.S. at 74; *Fontaine*, 411 U.S. at 215. Indeed, this Court has explained that whether a petitioner under Section 2255 has carried his burden of proof must be determined "[n]ot by the pleadings and the affidavits, but by the whole of the testimony." *Machibroda*, 368 U.S. at 495 (citations omitted).

Almonacid's allegations here are not so vague or conclusory as to warrant dismissal on that basis alone.[5] The allegations set forth in Almonacid's motion and supporting documents completely satisfy Rule 2 of the Federal Rules Governing Section 2255 Proceedings and 28 U.S.C. § 2255 and require an evidentiary hearing under this Court's precedent. Specifically, Almonacid alleges as his grounds

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[5] Indeed, neither the district court nor the Seventh Circuit cited this as the basis for dismissing Almonacid's petition without an evidentiary hearing.

for relief that "counsel failed to properly advise me regarding the Government [sic] proffer of [sic] 8-year sentence for guilty plea." (R.1-1 at 4.) But he did not stop there. He proceeded to elaborate upon this claim with additional allegations in his affidavit, which indicated that he "did not understand the mechanics of the federal criminal justice system" and that he "deferred to [] counsel to . . . inform [him] adequately," but that counsel did not inform him about the significance of "codefendant's testimony." (R.3 at 1.) Further, Almonacid explained that counsel did not "explain that the guilty plea coupled with a cooperation agreement . . . would surely result in a significantly lower sentence than 235 months" (R.1-1 at 4.); that counsel led him to "believe that he could not be found guilty without any actual drugs being confiscated" (R.1-1 at 16.); and that counsel never advised him of the "benefits of the proffered eight-year sentence from the government."[6] Finally, Almonacid stated in no uncertain terms: "[H]ad I been properly advised I would have accepted the Government's offer of eight-year and entered a guilty plea." (R.3 at 1.)

These allegations, when viewed against the record, were not so "palpably incredible" or so "patently frivolous or false" as to warrant dismissal without an evidentiary hearing. (*Id.* (quoting *Herman v. Claudy*, 350 U.S. 116, 119 (1963))). Indeed, neither the district court nor the Seventh Circuit could have reasonably determined that counsel's performance during trial defeated Almonacid's claims because his allegations plainly relate to communications between him and counsel *before* trial; those communications indisputably did not take place on the record or elsewhere before the district judge. Significantly, the government never challenged the veracity of Almonacid's allegations, nor did the government submit any evidence, such as an affidavit from counsel or copies of correspondence between counsel and client, to prove conclusively that he was entitled

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[6] That Almonacid also alleges that counsel's assessment of the evidence against him was unrealistic, *i.e.*, "they have nothing on [you]," does not diminish his clear complaint that counsel did not explain or inform him of the benefits of the plea offers, including the sentencing risks of going to trial. (R.1-1 at 4; R.3 at 1.)

to no relief. *Cf. Gallo-Vasquez*, 402 F.3d at 798 (considering letter from counsel to the defendant which disproved the allegations in defendant's motion). What is more, the government concedes that its assertion that the district judge informed Almonacid that he faced almost twenty-five years at his initial appearance hearing was pure conjecture — it had no way of showing that Almonacid had been told his sentencing exposure by the court during this proceeding. (Tr. at 20–21.) Because nothing in the record discredits Almonacid's allegation that, had he known that he could have received the 235–month sentence imposed (which is five years less than his maximum exposure) he would have accepted the eight-year plea offer, he was entitled to an evidentiary hearing under the clearly established precedent of this Court and the plain language of 28 U.S.C. § 2255.

For the foregoing reasons, the Seventh Circuit's decision must be vacated and the case remanded to the district court for an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 2007

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED FEBRUARY 14, 2007

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 05-4753.

Juan ALMONACID,

Petitioner-Appellant,

v.

UNITED STATES of America,

Respondent-Appellee.

Argued Dec. 8, 2006.
Decided Feb. 14, 2007.

Before EASTERBROOK, Chief Judge, and POSNER and RIPPLE, Circuit Judges.

RIPPLE, Circuit Judge.

Juan Almonacid was convicted by a jury of conspiracy to distribute and to possess with intent to distribute more than five kilograms of cocaine. The district court imposed a sentence of 235 months' imprisonment. We affirmed Mr. Almonacid's conviction on direct appeal. *See United States v. Almonacid,* 70 Fed.Appx. 390, 391 (7th Cir.2003).

Mr. Almonacid then brought a motion under 28 U.S.C. § 2255 alleging, among other matters, the ineffective assistance of trial counsel. The district court denied the petition without an evidentiary hearing. We granted a certificate of appealability limited to his claim of ineffective assistance of counsel. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

BACKGROUND

Mr. Almonacid was a confederate of Hugo Catano, the leader of a criminal organization that conspired to import and to distribute large amounts of cocaine. On multiple occasions, Mr. Almonacid personally received large quantities of cocaine and facilitated payment for the drugs. Mr. Almonacid's participation in the conspiracy extended beyond transporting drugs and money. He also engaged a chemist to test the purity of the cocaine received by the Catano organization and rented an apartment for Catano. When the conspiracy collapsed, Mr. Almonacid abruptly left his home.

In December 1998, the Government indicted Mr. Almonacid and seven others on a single count of conspiracy to distribute and to possess with intent to distribute more than five kilograms of cocaine. Despite Mr. Almonacid's close contact with Catano and other members of the conspiracy, the Government had relatively little direct evidence connecting him to the conspiracy. More precisely, the Government had no forensic evidence connecting

Mr. Almonacid to the cocaine, no photographic evidence of Mr. Almonacid engaging in the conspiracy, no voice recording of Mr. Almonacid or even any mention of his name on a wiretap, and no witness who observed Mr. Almonacid engage in any drug-related activities. The Government's case rested primarily on the testimony of cooperating co-conspirators.

Mr. Almonacid also had a number of potential defenses. First, the cooperating co-conspirators were all testifying against him in exchange for leniency. Additionally, one of the cooperating co-conspirators previously had provided the Government with a chart of the Catano organization that did not include Mr. Almonacid. Lastly, a non-cooperating co-conspirator testified that he, not Mr. Almonacid, was the "Cookieman" identified by one of the cooperating co-conspirators as Mr. Almonacid.

Prior to trial, the Government extended a plea offer. Under its terms, Mr. Almonacid would plead guilty to two counts of using a telephone to facilitate a drug trafficking offense. The maximum penalty for these offenses was eight years' imprisonment. By contrast, the maximum penalty Mr. Almonacid faced if convicted on the conspiracy charge was twenty-five years' imprisonment. Mr. Almonacid's attorney advised him to reject the Government's offer, based largely on the strength of the defense. Mr. Almonacid rejected the plea offer, but, after a jury trial, was convicted and sentenced to 235 months' imprisonment.

After his direct appeal, Mr. Almonacid filed a motion to vacate or set aside his sentence. *See* 28 U.S.C. § 2255. He

requested an evidentiary hearing. In his § 2255 motion, Mr. Almonacid alleged, among other matters, ineffective assistance of counsel with respect to his decision to reject the plea. He contended that he had based his decision on trial counsel's assurances that the Government "had nothing on [him]." R.1-1 at 16. He further contended that counsel had a motive to encourage Mr. Almonacid to reject the plea offer because the fee arrangement with his trial counsel called for a fee of $15,000 for a plea agreement and $25,000 for a trial.

The district court denied Mr. Almonacid's petition without an evidentiary hearing. The court held that Mr. Almonacid had not shown any deficiency in the performance of trial counsel that would rise to the level of constitutional ineffectiveness. Because it found no deficiency in trial counsel's performance, the court found it unnecessary to reach the issue of whether Mr. Almonacid suffered any prejudice.

Mr. Almonacid filed a timely appeal. We granted a certificate of appealability limited to Mr. Almonacid's claim of ineffective assistance of counsel with regard to his decision to reject the Government's plea offer.

II

DISCUSSION

The district court denied Mr. Almonacid's § 2255 motion and his request for an evidentiary hearing after finding, based on the record and events of the trial, that Mr. Almonacid

could not show that trial counsel's conduct was constitutionally deficient. We review the district court's conclusions of law de novo and its denial of a motion for an evidentiary hearing for abuse of discretion. *Bruce v. United States,* 256 F.3d 592, 597 (7th Cir.2001). Because an error of law is, by definition, an abuse of discretion, *United States v. Rea-Beltran,* 457 F.3d 695, 702 (7th Cir.2006), any error of law in dismissing Mr. Almonacid's motion for an evidentiary hearing would constitute an abuse of discretion.

As we noted recently in *Kafo v. United States,* 467 F.3d 1063, 1068 (7th Cir.2006), relief under § 2255 is an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process. Consequently, Rule 4 of the *Rules Governing Section 2255 Proceedings for the United States District Courts* provides that "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." Only when the district court has determined that the § 2255 motion ought not be dismissed at that early stage does the district court have occasion to determine whether an evidentiary hearing is required. *See* Rule 8(a) of the *Rules Governing Section 2255 Proceedings for the United States District Courts.* As we said in *Bruce v. United States,* 256 F.3d 592 (7th Cir.2001), a "district court need not grant an evidentiary hearing in all § 2255 cases." *Id.* at 597. "Such a hearing is not required if 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' " *Id.* (quoting 28 U.S.C. § 2255).

Appendix A

We have held that the Sixth Amendment right to effective assistance of counsel extends to assistance rendered when deciding whether to reject a plea offer. *Toro v. Fairman,* 940 F.2d 1065, 1067 (7th Cir.1991). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial counsel's performance will not be considered deficient unless it falls "below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. Further, trial counsel is entitled to a "strong presumption" that his performance fell "within the wide range of reasonable professional assistance" and will not be judged with the benefit of hindsight. *Id.* at 689, 104 S.Ct. 2052. When counsel advises the defendant to reject a plea offer, his performance is not objectively unreasonable unless such advice is made "in the face of overwhelming evidence of guilt and an absence of viable defenses." *Gallo-Vasquez v. United States,* 402 F.3d 793, 798 (7th Cir.2005).

Mr. Almonacid's sworn § 2255 motion and affidavit were the only pieces of evidence submitted in support of his motion. *See Kafo,* 467 F.3d at 1068 (holding that allegations within an affidavit or motion signed under penalty of perjury become evidence by which the district court may judge the sufficiency of the movant's claims). Mr. Almonacid admits that his attorney informed him of the plea offer and of the likely sentence. He does not contend that his counsel misrepresented the potential sentencing exposure under either

scenario.[1] Rather, he submits that he was misled by counsel's predictions that he would prevail at trial. *See* R.1-1 at 16.

Mr. Almonacid's attorney did not make this estimation "in the face of overwhelming evidence of guilt and an absence of viable defenses." *Gallo-Vasquez,* 402 F.3d at 798. As the district court noted, the Government's case relied largely on the testimony of cooperating co-conspirators. R.24-1 at 1-2. The Government had no forensic evidence linking Mr. Almonacid to any cocaine, and it had no witnesses who could identify Mr. Almonacid as a participant in the conspiracy other than the cooperating co-conspirators. *Id.* at 6. Further, Mr. Almonacid had a number of viable defenses, including bias on the part of the testifying co-conspirators and mistake of identity. *Id.* at 6.

Thus, based on the evidence submitted by Mr. Almonacid and on the district court's observations from prior proceedings, it cannot be said that the court erred when it concluded that Mr. Almonacid's trial counsel did not fall below an objective standard of reasonableness when he advised Mr. Almonacid not to accept the Government's offer.[2]

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1. *Cf. United States v. Golden,* 102 F.3d 936, 943 (7th Cir.1996) (holding that trial counsel's performance was within the range of competent representation when he informed the defendant of the charges, the plea offer, the likely prison sentence if convicted and the likely prison sentence under the plea offer).

2. Mr. Almonacid submits that it was improper for the court to consider the events at trial because *Strickland v. Washington,* 466

(Cont'd)

Appendix A

Conclusion

Accordingly, we conclude that the district court correctly denied the § 2255 petition without conducting a hearing. Mr. Almonacid's petition fails to disclose a basis upon which he could prevail on his claim of ineffective assistance of counsel. The judgment of the district court is affirmed.

Affirmed.

(Cont'd)

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), directs our inquiry to the objective reasonableness of the attorney's performance to what the attorney knew at the time of the allegedly deficient performance. 466 U.S. at 689, 104 S.Ct. 2052. This argument gives little attention to *Strickland's* admonition that a reviewing court should make every effort to avoid second guessing the decisions of trial counsel with the benefit of hindsight. *Id.* Further, the *Rules Governing Section 2255 Proceedings* clearly permit the district court to look to the record of the prior proceeding in advance of any evidentiary hearing and base its decision to dismiss the petition on that review. *See* Rule 4(b) of the *Rules Governing Section 2255 Proceedings for the United States District Courts; see also Gallo-Vasquez v. United States,* 402 F.3d 793, 797 (7th Cir.2005); *Rodriguez v. United States,* 286 F.3d 972, 986-87 (7th Cir.2002); *Bruce v. United States,* 256 F.3d 592, 597 (7th Cir.2001).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED NOVEMBER 4, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2005 U.S. Dist. LEXIS 26636

No. 04 C 4481

JUAN ALMONACID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

November 4, 2005,
Decided November 4, 2005, Filed

JUDGES: Judge James B. Zagel.

OPINION BY: James B. Zagel

Appendix B

OPINION:

MEMORANDUM OPINION AND ORDER

This is a § 2255 petition which offers four attacks on the judgment of guilty and the sentence. They are simple to state. One, Petitioner Juan Almonacid ("Almonacid") says his defense counsel gave him bad advice on whether to accept a plea. Two, he claims defense counsel should have gotten the "safety valve" reduction for him. Three, he alleges counsel should have prevented imposition of the fine on grounds of indigency. Four, he states counsel failed to make an adequate challenge to the drug quantity.

Almonacid was charged with conspiracy with intent to distribute more than five kilograms of cocaine. There were many defendants and the case was split into different trials, both here and in Vermont, but it is best characterized as the Catano conspiracy case-even though Catano was never tried and Almonacid's counsel offered his opinion that Catano was dead. Many people worked for Catano. There was evidence from other conspirators (whose role was to transport money and drugs) that Almonacid received delivery of 130 kilograms in four separate shipments-all made to Chicago. The leading transporter also testified that Almonacid had driven him to a meeting with Catano. Another conspirator (Catano's girlfriend) testified she saw Almonacid meet with Catano almost every day and she testified that Catano's only occupation was drug dealing. A final conspirator (who was responsible for picking up and storing cocaine) testified that he heard Almonacid say that Catano's group had just moved 500 kilos of cocaine, that he saw Almonacid hand cocaine to

a chemist that Catano had hired to test the drugs, and that after the conspiracy was broken up, he saw Almonacid and Catano together in Colombia.

There was very little corroboration of this from uninvolved witnesses. There was some evidence of suspicious conduct by Almonacid, who rented an apartment in his name for Catano to use in Chicago, gave useless address information when purchasing a car, and promptly moved out of a house on which the rent had been paid when the drug ring was broken suddenly by police action.

The defense was based on tough cross-examination of the accomplices and a suggestion that Almonacid was not the "Cookieman" about whom the witnesses testified. Almonacid offered the testimony of another conspirator, Demirjian (convicted in a separate trial). Demirjian testified that he was the Cookieman.

The jury returned a verdict of guilty and found that there were more than 50 kilos of cocaine. The Court of Appeals affirmed the verdict against challenges to the sufficiency of the evidence and the removal of a juror. Almonacid subsequently filed this petition under 28 U.S.C. § 2255.

Section 2255 relief is limited to situations in which a federal criminal petitioner's conviction or sentence is based on "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Bischel v. United States*, 32 F.3d 259, 263 (7th Cir. 1994). If I find that any such error occurred, I must vacate or set aside Almonacid's sentence,

after which he will be discharged, resentenced, or granted a new trial. *Lee v. United States,* 113 F.3d 73, 77 (7th Cir. 1997) (citing 28 U.S.C. § 2255). In reviewing [*4] his petition, I must review the record and draw all reasonable inferences in favor of the government. *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992). However, because Almonacid has filed his petition *pro se,* his petition is entitled to a liberal reading. *Blake v. United States*, 841 F.2d 203, 205-06 (7th Cir. 1988).

The issues properly before me are only those related to the performance of counsel. There is no constitutional ground on which the sentencing decisions I made can be challenged on their merits. The law with respect to challenges to effective assistance of counsel is well developed. Almonacid needs to show that counsel made errors so serious that they fall outside of a wide range of acceptable professional conduct. If this showing is made, Almonacid must prove that he was prejudiced by these mistakes, i.e., that there is a reasonable probability that the outcome would have been different if the mistakes were not made. There is a fairly strong presumption of competence and a bar against routine second-guessing. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) *Holman v. Gilmore*, 126 F.3d 876 (7th Cir. 1997). I consider the claims with respect to sentencing first.

The safety-valve issue revolves around the criteria that a defendant fully cooperate with the government and answer all of its questions about the offense and related offenses. All that is claimed here with respect to the safety-valve is

that which Almonacid's lawyer presented to me — that Almonacid offered information that might help authorities find Catano and one other fugitive. This could not possibly be all of the information Almonacid had concerning the offense because it did not reveal his own conduct or that of others in committing the offense. Indeed, his allocution made it clear he was unwilling to speak candidly about his role in the offense. He offered to help the government find two men whom the government wanted and for whose apprehension the government might well have given some benefit, but he did not give the complete information required to invoke the safety-valve, which can apply even where the government acquires no information of any value to it. Defense counsel could not have done any better than he did. He recited what the facts were and asked for leniency, which fulfills his duty. There was also no prejudice. *See United States v. Harris*, 230 F.3d 1054 (7th Cir. 2000).

The failure to argue for waiver of the fine is not ineffective assistance. Almonacid was educated and had conducted a legitimate business. He had retained counsel. His assertion that he had no assets was not verified, and whatever assets he might have would be in far-off Spain. I concluded that he had the ability to pay a fine while in custody and, indeed, he seems to be doing so. One of his reasons for seeking remission of the fine is that the Bureau of Prisons takes a percentage of the money he receives from his family in Spain in order to pay the fine. He wishes to use all the money for his own purposes. He seems to believe that the funds sent to him are not his but those of his family. Of course, when he receives them and the power to use them, they become his funds. In any event, defense counsel cannot

be criticized for failing to seek remission of the fine. I doubt that Almonacid would have wanted to disclose all information concerning his finances. In any event, my assessment that the fine would be paid, at least in part, turns out to be correct and there is no proof of prejudice.

The drug quantity claim is difficult to comprehend because defense counsel did attack, with some vigor, the amount the government sought to attribute to Almonacid. In the end, I essentially accepted his argument because I attributed to Almonacid only the quantity that he personally handled. I made no formal finding because the sentence I wanted to impose, and did, was permissible under both guidelines — the one the government wanted and the one the defense wanted. There is no cause to conclude that defense counsel did a bad job and, even if he had, there was no prejudice.

The core issue in this petition is the plea offer that the government stipulates that it made to Almonacid, who is serving a sentence just short of twenty years. The agreement was a plea to two counts of using a telephone to facilitate a drug trafficking offense. Had he agreed to this, Almonacid would face a maximum penalty of eight years. In fact, given the probable Guideline calculations, it would have been a minimum of eight years as well. In effect it was a deal for an eight-year sentence.

Defense counsel told Almonacid about the deal and discussed it with him. What defense counsel did was to describe his view of the evidence and recommend rejection of the plea. Almonacid understood it was his decision to

make, but says that on the basis of what defense counsel said to him and to his wife, he was discouraged from accepting the plea.[1]

The rule is that defense counsel must inform their clients of plea offers and remit the decision to the client while offering their best advice. In some jurisdictions, courts rejected any argument that a conviction could be challenged for bad advice leading to rejection of a good plea deal on the grounds that the defendant received all he was due — a fair trial on the charge. A defendant could pursue only a civil suit for damages against the lawyer. *See German v. United States*, 525 A.2d 596 (D.C. App. 1987). But this proposition did not carry the day. *See State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (Ariz. Ct. App. 2000) (discussing cases). In our Circuit, a petitioner can prevail by showing that counsel was ineffective in advising rejection of a plea agreement "in the face of overwhelming evidence of guilt and an absence of viable defenses." *Gallo-Vasquez v. United States*, 402 F.3d 793, 798 (7th Cir. 2005).

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1. Almonacid argues that defense counsel had a financial incentive to discourage the plea because his fee was $ 15,000 for plea and $ 25,000 for a trial. While a fee structure might, in rare cases, bring into question the motivation of defense counsel in giving plea advice, I reject the proposition that $ 10,000 would be an incentive for any busy defense counsel to undertake a trial of the length of this one. The trial of this case was, and could easily have been seen in advance to be, arduous for the defense. In this case, a far better argument could be made for defense counsel's financial motivation if Almonacid had taken the plea and was now challenging advice to take the plea. The defense counsel in this case is very experienced and has shown no reluctance to negotiate for guilty pleas and to urge his clients to accept them.

In this case, it is clear the evidence was not overwhelming. No innocent witness nor law enforcement officer could offer meaningful evidence against Almonacid. As the Government notes,

> no drugs were seized from Almonacid. His prints were not recovered on any seized drugs. He was not present when drugs were seized. Law enforcement never saw him handling drugs or making drug deals. He was not on tape. No phone records contained his phone number. And there was no confession.

(Gov't Resp. at 16-17).

Additionally, there were decent defenses to make. On the question of whether the witnesses identified the right defendant, there was the fact that law officers never saw Almonacid during surveillance and that the Cookieman (as he was referred to by two witnesses) was a nickname that belongs to another conspirator. There was another witness, the closest to Catano, who drew a chart of the conspirators (at the government's request) and that chart did not include Almonacid. All the important witnesses against Almonacid made deals to offer evidence in exchange for leniency. Three of these witnesses were the kinds of persons whose demeanor and backgrounds would suggest that they never expected to go to prison — persons whom an ordinary jury would believe might be especially fearful of incarceration.[2] Lastly, the

2. These are the witnesses Blanca Rojas, Eric Abrams and Rivka Medow.

absence of the elements recited in the quoted passage from the government response would be a centerpiece of the theme of a decent defense.

Defense counsel used all these weapons. The jury could have gone either way and there was reason to believe the defense would be successful. I thought so at the time, and, based on my observation of the demeanor of prosecutors and defense counsel, I believe that they thought so too.[3] Considerable deference is owed to tactical judgment of counsel in these cases. Defense counsel's advice was not based on a misunderstanding of the law or the admissibility of evidence. His decision was based on an assessment of the weight of the evidence. It is quite impossible on this record and the events of the trial to conclude that defense counsel's conduct fall outside the ambit of professional competence. I do not pause to address the question of prejudice since counsel gave competent advice.[4]

The Petition is denied.

ENTER:

James B. Zagel
United States District Judge

DATE: November 4, 2005

3. I recall, in particular, the visible bodily indicia of relief on the part of one prosecutor when the guilty verdict was read.

4. The government also argues that there is no prejudice proved. This is based on the fact that Almonacid has not shown a willingness ever to admit his role in the offense. I suspect that he is willing to plead guilty now but, at trial, the arrows all pointed in a different direction. There is no claim that an *Alford* plea was offered.